LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 8 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 425

BIRMINGHAM ICE AND COLD STORAGE COMPANY AND SHAW WAREHOUSE COMPANY, *Appellants*

v.

SOUTHERN RAILWAY COMPANY, ET AL., *Appellees*

MOTION TO DISMISS OR AFFIRM OF APPELLEES JEFFERSON WAREHOUSE AND COLD STORAGE COMPANY AND W. C. HUDLOW, JR.

JAMES W. WRAPE
GLENN M. ELLIOTT
2111 Sterick Building
Memphis 3, Tennessee
Counsel for above-named Appellees

Of Counsel:

WRAPE AND HERNLY
2111 Sterick Building
Memphis 3, Tennessee
and
711 Fourteenth Street, N. W.
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Motion to Dismiss	2
Motion to Affirm	5
Summary and Conclusion	11
Appendix "A"	12

INDEX OF CITATIONS

Alexander Sprunt & Son, Inc. v. United States, 281 U.S. 249, 255, 50 S. Ct. 315	4
Boston Tow Boat Company v. United States, et al., 321 U.S. 632, 64 S. Ct. 776	4
Fishgold v. Sullivan Drydocks & Repair Corp., 328 U.S. 275, 291, 66 S. Ct. 1105, 1114	4
Shaw Warehouse Company v. Southern Railway Company, 288 F. 2nd 759 (C.A. 5, 1961), rehearing denied 294 F. 2nd 850 (C.A. 5, 1961)	3, 4, 10
Shaw Warehouse Company v. Southern Railway Company, 308 I.C.C. 609	4, 5, 7, 8, 10
Southern Railway Company v. United States, 186 F. Supp. 29 (N.D. Ala. 1960)	4, 10
28 U.S.C. sec. 2323	3, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 425

BIRMINGHAM ICE AND COLD STORAGE COMPANY AND SHAW WAREHOUSE COMPANY, *Appellants*

v.

SOUTHERN RAILWAY COMPANY, ET AL., *Appellees*

MOTION TO DISMISS OR AFFIRM OF APPELLEES JEFFERSON WAREHOUSE AND COLD STORAGE COMPANY AND W. C. HUDLOW, JR.

Come the appellees Jefferson and Cold Storage Company and W. C. Hudlow, Jr., and, pursuant to Rule 16 of the Revised Rules of the Court, respectfully move the Court to dismiss the appeal in this cause or to affirm the judgment below, and for grounds respectfully show to the Court:

In limine these appellees would direct the attention of the Court to the fact that they assume alternative positions. Insofar as this appeal is concerned, these appellees take the position that the appeal should be

dismissed or that the judgment below should be affirmed, but, insofar as the judgment below is concerned, the position of these appellees is that same should be affirmed *only as respects the appellants herein.* Appellees herein, Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr., are much aggrieved at the action of the court below in the cause styled *United States of America* v. *Southern Railway Company, et al.,* as reflected by the memorandum opinion and decree reproduced as Appendix "C" to appellants' jurisdictional statement. These appellees have, in fact, duly filed in the United States District Court for the Northern District of Alabama, Southern Division, in Cause No. 9155, notice of appeal from such memorandum opinion and decree entered June 8, 1962, and the final order thereon entered July 31, 1962, which order is reproduced as Appendix "D" to appellants' jurisdictional statement. Such notice of appeal and designation of record was filed and served on September 27, 1962, and was certified to this Court by the Clerk of the United States District Court for the Northern District of Alabama on September 27, 1962. It is the position of these appellees that, in this cause, the action of the court below is binding upon appellants herein, but that same is invalid as to these appellees in the action, *supra*, wherein the United States of America is plaintiff.

MOTION TO DISMISS

It is respectfully presented that the appeal is not within the jurisdiction of this Court, and appellants have no standing before the Court. Contra to the allegations made in appellants' jurisdictional statement, this is not an action to revoke, set aside or enforce an order of the Interstate Commerce Commission.

With respect to this action, as stated by the court below, pp. 24-25 of appellants' jurisdictional statement:

> "It is a proceeding under Section 3 of the Elkins Act (49 U.S.C.A. sec. 43) and Section 20(9) of the Interstate Commerce Act (49 U.S.C.A. sec. 20(9)) to enforce such Acts. The court and the parties are bound by the report and order in *Shaw Warehouse Company* v. *Southern Railway Company*, supra." [*Shaw Warehouse Company* v. *Southern Railway Company*, 288 F. 2nd 759 (C.A. 5, 1961)].

Appellants were permitted to intervene in the cause below, as is reflected by their motion for leave to intervene and their complaint in intervention, under Section 2323 of the Judicial Code (28 U.S.C. sec. 2323). Such section is reproduced hereto as Appendix "A". It is to be noted that such section is a part of Chapter 157 of the Judicial Code, which is entitled "Interstate Commerce Commission Orders; Enforcement and Review".

The proceeding below was *not* an action to enforce or review an order of the Interstate Commerce Commission. The United States of America has not served notice of appeal from the orders of the court below, and the time for so doing has expired.

The appellants, as intervenors below, have no such interest in the cause as to invest them with an independent right to appeal, and, we respectfully submit, no statute is cited by appellants granting them such right.

Appellants neither seek nor can they receive direct benefit by way of their attack upon the orders of the

court below; by their appeal they simply seek to have this Court rule that appellees should be held responsible for the payment of obligations of two bankrupt corporations. Appellants are not creditors of such corporations. Or that appellees should have been required to pay rental on premises not occupied by them. Appellants have no interest in such premises. Or, that appellees should have been required to pay rental prior to September 1, 1960, upon a basis not established by the Interstate Commerce Commission to be a proper basis until September 1, 1960, in *Shaw Warehouse Company* v. *Southern Railway Company, et al.*, 308 I.C.C. 609, *Southern Railway Company* v. *United States*, 186 F. Supp. 29 (N.D. Ala. 1960). Appellants have no interest in the premises or rental payments, and the basis upon which rental was paid by appellees was in effect, approved in *Shaw Warehouse Company* v. *Southern Railway Company*, 288 F. 2nd 759 (C.A. 5, 1961), rehearing denied 294 F. 2nd 850 (C.A. 5, 1961).

The position of appellants is strictly that of the "dog in the manger". They seek to have a treble-penalty imposed against appellees under the Ellsins Act, when appellants have no standing thereunder, and the payment of rental by appellees which United States of America, plaintiff below, neither seeks nor requires.

It is submitted, therefore, that the court is without jurisdiction to entertain the appeal. See *Boston Tow Boat Company* v. *United States, et al.*, 321 U.S. 632, 64 S. Ct. 776, and cases there cited; *Alexander Sprunt & Son, Inc.* v. *United States*, 281 U.S. 249, 255, 50 S. Ct. 315; *Fishgold* v. *Sullivan Drydocks & Repair Corp.*, 328 U.S. 275, 291, 66 S. Ct. 1105, 1114.

MOTION TO AFFIRM

Appellees Jefferson Warehouse and Cold Storage Company and W. C. Hadlow, Jr., respectfully submit that the judgment below should be affirmed because it is manifest that the questions on which decision of the appeal depends are so unsubstantial as not to need further argument.

The record does not support the statement of the case, nor the circumstances of the case, presented by appellants in their jurisdictional statement:

In 1955 a contract was entered into between an Alabama corporation known as Birmingham Food Terminal, and Georgia Industrial Realty Company, a wholly owned subsidiary of Southern Railway Company, as a result of which a food terminal and warehousing facility was to be constructed in Birmingham, to be known as Birmingham Food Terminal. Stockholders in Birmingham Food Terminal were to be tenants of the proposed facility.

Upon the filing of complaint with the Interstate Commerce Commission by Shaw Warehouse Company, et al., in the cause styled *Shaw Warehouse Company v. Southern Railway Company*, 308 I.C.C. 609, the proposed financing for the Birmingham Food Terminal was withdrawn, and a so-called "Round Robin Agreement" was entered into between Georgia Industrial Realty Company and prospective tenants of Birmingham Food Terminal. This agreement provided for the purchase of facilities occupied by the prospective tenants, and the payment of interim rentals therefor. Two of the signatories thereto were Birmingham Terminal Cold Storage Company and Thomas N. Nelson Company.

These two companies occupied buildings designated as buildings numbers 2 and 8 in Appendix "C" to appellants' jurisdictional statement, pages 23 and 28.

As appears at page 25 of appellants' jurisdictional statement, the court below found:

> "As of July 1, 1958, Nelson Company owed back rents, later found inadequate by the Commission, in the amount of $176,410.04, and Terminal Cold Storage owed $61,239.88. Neither was able to pay its arrearage and neither was able to continue its operation".

The practical aspects of the situation were, therefore, that in two large warehouses the Nelson Company and Birmingham Terminal Cold Storage Company had millions of pounds of merchandise in cold storage, against which warehouse receipts had been issued, and, as stated by the court below, "neither was able to continue its operation." Southern Railway Company was perforce confronted with the necessity of going into the warehousing business or working out some arrangement with an experienced warehouseman to take over the operation of buildings Nos. 2 and 8 in the Birmingham Food Terminal.

Southern Railway Company had had satisfactory experience with Mr. W. C. Hudlow, Jr., in the operation of Chattanooga Warehouse and Cold Storage Company in Chattanooga.

In July, 1958, Mr. W. C. Hudlow, Jr., did agree to conduct warehousing operations at buildings Nos. 2 and 8 through a corporation to be formed, and which was formed, known as Jefferson Warehouse and Cold Storage Company.

The assets of Birmingham Ice and Cold Storage Company and of Thomas N. Nelson Company were liquidated, and every single penny received from the liquidation thereof was paid to the creditors of such companies; some of the experienced personnel of Chattanooga Warehouse and Cold Storage Company devoted some time to converting the operations at buildings Nos. 2 and 8 at the Birmingham Food Terminal facility to an efficient operation, and they were paid by Jefferson Warehouse and Cold Storage Company for all time spent by them in so doing; some equipment of Chattanooga Warehouse and Cold Storage Company, such as pallets and fork-lift trucks were temporarily utilized at Birmingham and full payment for such utilization was made by Jefferson Warehouse and Cold Storage Company.

Warehouse receipts of Jefferson Warehouse and Cold Storage Company were issued in lieu of outstanding warehouse receipts of Thomas N. Nelson Company and Birmingham Ice and Cold Storage Company, with the result that no customer of either of the warehouses suffered any financial loss.

As of approximately August 1, 1958, Jefferson Warehouse and Cold Storage Company entered into an arrangement with Southern Railway Company and its subsidiary, Georgia Industrial Realty Company, under and by virtue of which it proposed to pay, and did pay, rental upon a monthly basis for space actually occupied by Jefferson Warehouse and Cold Storage Company.

As of September 1, 1960, the report and order of the Interstate Commerce Commission in *Shaw Warehouse Company* v. *Southern Railway Company, et al.*, 308

I.C.C. 609, became effective. The date of the report and order was October 6, 1959, but the effective date of the rental base established thereby was September 1, 1960. By such report and order, the rental payable by Jefferson Warehouse and Cold Storage Company for buildings Nos. 2 and 8 was substantially increased.

Included in the rental base upon which rentals were to be calculated were rentals for expansion areas neither occupied nor occupiable by Jefferson Warehouse and Cold Storage Company, office space available for use by the general public and neither occupied nor occupiable by Jefferson Warehouse and Cold Storage Company, the cost of making repairs for latent defects in the cold storage systems, early construction costs which were incurred by Birmingham Terminal Cold Storage Company and Thomas N. Nelson Company, with no benefit whatsoever to Jefferson Warehouse and Cold Storage Company, and the costs of engineering plans and specification which were never utilized, and which were of no benefit to Jefferson Warehouse and Cold Storage Company.

Irrespective of the foregoing factors, which were incorporated in the rental base by the court below, Jefferson Warehouse and Cold Storage Company was the only tenant of any warehouse in the Birmingham Food Terminal facility which attempted to pay, and did pay, rental upon the basis of space actually occupied by it from and after September 1, 1960, under the formula prescribed by the Commission, and from the time that Jefferson Warehouse and Cold Storage Company occupied space in the Birmingham Food Terminal facility until the date of the trial of the cause below it paid rental in the amount $711,084.62.

All equities contra notwithstanding, by the order of the court below all other tenants were excused from the payment of back-rental under the formula enunciated by the Interstate Commerce Commission until from and after May 2, 1962, but Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr., were operated with the payment thereof from and after September 1, 1960. Obviously, equity has not been done.

The cause in which appellants appeal, being Civil Action No. 9155 in the United States District Court for the Northern District of Alabama, Southern Division, was initiated by the filing of complaint on July 18, 1958, by the United States of America. Defendants named in the complaint were Southern Railway Company and tenants who had signed the "Round Robin Agreement"; neither Jefferson Warehouse and Cold Storage Company nor W. C. Hudlow, Jr., were named as parties defendant.

Subsequently, on May 5, 1961, upon the representation that the action involved interpretation or enforcement of an order of the Interstate Commerce Commission under 28 U.S.C. sec. 2323, the appellants herein filed their complaint in intervention, joining Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr., as parties defendant, and attempting to join Chattanooga Warehouse and Cold Storage Company as a party defendant. Neither of these corporations nor Mr. Hudlow had been joined by the United States of America as a party defendant in the original action filed.

On October 19, 1961, as appears from appendix "A" to the jurisdictional statement of appellants, the court

dismissed the complaint in intervention insofar as it related to Chattanooga Warehouse and Cold Storage Company, and made this further observation, as appears at page 13 of appellants' jurisdictional statement:

> "The disposition which the court is about to make of such motions is not to be construed as an indication that an opinion is presently entertained that the intervening plaintiffs may be entitled to any relief which is not included in or ancillary to the prayers for relief in the original complaint as amended."

It is obvious from the pleadings, of course, that the intervening plaintiffs sought relief which had not been sought by the United States of America in its original complaint or the amendment thereto.

In due course, the United States of America had filed an amended complaint in which it named Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr., as parties defendant, but still no recovery was sought of these defendants in line with the prayers of the complaint in intervention filed on behalf of Birmingham Ice and Cold Storage Company and Shaw Warehouse Company.

Both before and subsequent to the time that appellees occupied any portion of the warehouses at Birmingham Food Terminal, various proceedings were in process before the Interstate Commerce Commission and before the courts, to which appellees were not parties. See, for example, *Shaw Warehouse Company* v. *Southern Railway Company, et al.*, 308 I.C.C. 609; *Southern Railway Company* v. *United States*, 186 F. Supp. 29 (N.D. Ala. 1960), *Shaw Warehouse Company* v. *Southern Railway Company*, 288 F. 2nd 759 (C.A.

5, 1961), rehearing denied, 294 F. 2nd 850 (C.A. 5, 1961).

SUMMARY AND CONCLUSION

It is respectfully submitted by appellees Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr., that their motion to dismiss should be sustained on the ground that the appeal of appellants is not within the jurisdiction of this Court and that their motion to affirm the judgment sought to be reviewed should be sustained on the ground that it is manifest that questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Appellants simply seek to have this Court impose penalties and order the collection of rentals in which appellants have no interest in law or in fact, and which relief is neither prayed nor sought by the United States of America, the original plaintiff in the cause.

Respectfully submitted,

JAMES W. WRAPE
GLENN M. ELLIOTT
Counsel for Appellees, Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr.

Of Counsel:

WRAPE AND HERNLY
2111 Sterick Building
Memphis 3, Tennessee
and
711 Fourteenth Street, N. W.
Washington 5, D. C.

APPENDIX "A"

Sec. 2323. Duties of Attorney General; intervenors

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein. As amended May 24, 1949, c. 139, Sec. 116, 63 Stat. 105.